

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

**UNITED STATES OF AMERICA,**

**V.**

**CRIMINAL NO. 04-10115-RCL**

**KEVIN VICKERS**

**MOTION TO STRIKE SURPLUSAGE FROM SUPERCEDING INDICTMENT  
[with incorporated points and authorities]**

Now comes Kevin Vickers, by and through his attorney, and respectfully moves, pursuant to the provisions of Fed. R. Crim. P. 7 (d) to strike any and all language appearing in the superceding indictment as it refers to "Notice of Additional Factors" and pertaining to the defendant Vickers.

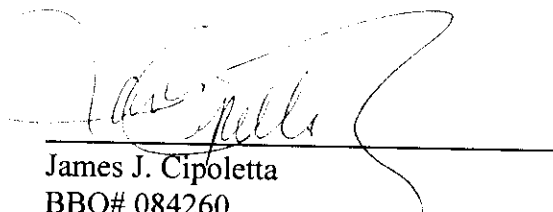
In support of this motion, the defendant states that the language is unduly prejudicial to the defendant, misplaced as it transfers a substantial portion of the sentencing function to the jury, and deprives the defendant of due process and a fair trial.

The "additional factors" portion of the superceding indictment transforms the indictment into a new criminal offense or an additional element of the charged offense without specific reference to any statutory reference or prohibition of the alleged conduct. This contravenes the Supreme Court holding in Hamling v. United States, 418 U.S. 87, 117-118 (1974) which states that "[t]he indictment...must be a plain, concise, and definite statement of the essential facts constituting the offense charges..."

Moreover, while Blakely invited Washington state prosecutors to include enhancements or aggravating factors in new indictments, it limited the invitation to statutory factors. *See, Blakely v. Washington*, 124 S.Ct. 2531, 2541-42 (2004). The “additional factors” in the superceding indictment are non-statutory and United States Sentencing Guidelines based.

Since the language in the “additional factors” section of the superceding indictment is not an essential element of the crime charged and is clearly prejudicial, the defendant, Kevin Vickers, requests that the Court strike the language from the indictment pursuant to its authority flowing from Fed. R. Crim. P. 7(d).

Respectfully submitted,  
Kevin Vickers,  
By his attorney,

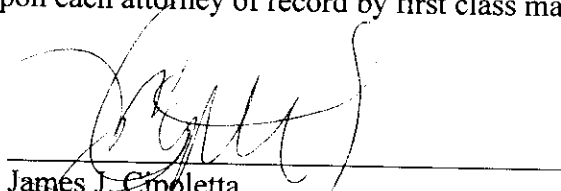


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Dated: 9 November 2004

*Certificate of Service*

I, James J. Cipoletta, attorney for the defendant, Kevin Vickers, hereby certify that I have served a copy of the foregoing upon the Government and upon each attorney of record by first class mail on November 9, 2004..



James J. Cipoletta